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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEORGE SHOTELL, JR., et al.,	
Plaintiffs and Respondents,	G040850
v.	(Super. Ct. No. 06CC01946)
LARRY ROTHMAN,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

James M. Hodges; Larry Rothman & Associates, Larry Rothman; The Durst Firm and Lee H. Durst for Defendant and Appellant.

Masson & Fatini, Richard E. Masson and Sanaz Farkhad, for Plaintiffs and Respondents.

Defendant Larry Rothman appeals from a judgment for plaintiffs George Shotell, Jr., and Danette K. Shotell on their legal malpractice complaint. He contends insufficient evidence showed causation — i.e., plaintiffs would have obtained a better result but for defendant's negligent representation of them in lease negotiations with their tenant and the ensuing breach of lease litigation.

We agree. Insufficient evidence showed plaintiffs would have obtained the three-year personal guarantee they sought from their tenant's principal but for defendant's transactional negligence. The principal testified he would not have agreed to that guarantee. No substantial evidence showed otherwise. And insufficient evidence showed plaintiffs would have held the principal personally liable for the tenant's unpaid rent but for defendant's litigation negligence. No substantial evidence supported the alter ego or fraud theories defendant failed to pursue. We reverse.

FACTS

The Lease and the RD Sport's Case

Plaintiffs owned a commercial building in Fountain Valley. They retained defendant to review lease documents with a potential tenant, RD Sport, Inc. (RD Sport), in 2001. Plaintiffs contemplated a one-year lease for space in the building with an option after the first year for RD Sport to lease the entire building for an additional three years. Plaintiffs told defendant of their intention to require RD Sport's principals, including Federico Pavoncelli, to personally guarantee the rent obligation for three months during the first year of the lease — and for the entire three-year extension if RD Sport exercised its option.

Plaintiffs relied upon defendant to ensure the lease documents effectuated their intended, three-year personal guarantee. But the lease documents required Pavoncelli to "issue a personal guarantee equal to three months rent," without accounting

for the three-year guarantee if RD Sport exercised its option. And the one-page personal guarantee that defendant drafted obligated Pavoncelli to pay "any and all indebtedness of [RD Sport]" "pursuant to the lease," without expressly providing for the three-year extension.

Plaintiffs consulted defendant when RD Sport indicated it wanted to exercise the option, but only with regard to its current space. Defendant's associate dictated a 29-word amendment over the telephone to memorialize the exercise of the option. The associate did not inform plaintiffs that changing the lease terms could void Pavoncelli's personal guarantee, whatever its duration. (Civ. Code, § 2819 ["A surety is exonerated . . . if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect"].)[1] The associate did not advise plaintiffs to have Pavoncelli execute a new personal guarantee. Plaintiffs believed the amendment obligated Pavoncelli to personally guarantee the lease for the three-year extension.

RD Sport fell behind on its monthly rental payments, and asked plaintiffs to reduce the rent in 2003. Plaintiffs asked defendant for legal advice concerning this dispute. Defendant's associate advised plaintiffs to lower the rent, but still did not warn plaintiffs that lease modifications could void Pavoncelli's personal guarantee. (§ 2819.) The associate did not advise plaintiffs to obtain a new personal guarantee.

Plaintiffs retained defendant in late 2003 to sue RD Sport and Pavoncelli for unpaid rent (the *RD Sport* case). Plaintiffs asked defendant to assert a fraud claim against Pavoncelli because he had omitted a prior encumbrance on RD Sport's assets from a financial statement he provided to plaintiffs in connection with the lease. Plaintiffs also expected defendant to seek to hold Pavoncelli personally liable for RD

[1] All further statutory references are to the Civil Code.

Sport's entire rent obligation as its alter ego. But defendant did not assert a fraud claim in the complaint or pursue the alter ego theory in discovery or at trial.

The court entered judgment for plaintiffs in the *RD Sport* case in early 2005. It found RD Sport liable for approximately $115,000 in unpaid rent, property damage, and prejudgment interest. The court found the lease modifications exonerated Pavoncelli's personal guarantee, but also found Pavoncelli entered into a post-modification, implied contract with the plaintiffs to personally guarantee three months rent at $6,000 per month. Accordingly, it found Pavoncelli liable for $18,000 in unpaid rent.

After trial, plaintiffs disputed defendant's attorney fees. While the dispute lingered, defendant did not seek to amend the judgment to add Pavoncelli as a judgment debtor. Plaintiffs eventually retained new counsel in the *RD Sport* case, though defendant was still an attorney of record in that matter.

In 2007, plaintiffs' new counsel worked with defendant to take Pavoncelli's judgment debtor examination and move — twice — to amend the *RD Sport* judgment to add him as a judgment debtor. The court denied the motions. It stated "the evidence is insufficient to establish alter ego liability," finding no support for plaintiffs' claims that Pavoncelli "commingled funds and raided corporate accounts to pay his personal expenses and treated company assets as his own."

The Legal Malpractice Case

Meanwhile, plaintiffs had initiated this legal malpractice action in 2006. At the 2008 trial, plaintiffs asserted a "two-prong basis" for liability: transactional and litigation malpractice. As for transactional malpractice, plaintiffs claimed defendant negligently drafted the personal guarantee to last for only three months and negligently advised them regarding the exonerating effect of the lease modifications. As for litigation malpractice, plaintiffs claimed defendant negligently failed to allege a fraud

cause of action against Pavoncelli, failed to pursue Pavoncelli's alter ego liability at trial, and failed to move expeditiously to amend the *RD Sport* judgment to add Pavoncelli as a judgment debtor.

Pavoncelli testified at trial about the personal guarantee. He stated he would not have agreed to personally guarantee the lease for longer than three months. He explained, "The only reason we ever agreed to drive 22 miles every day to and from work [at plaintiffs' Fountain Valley building] was because Mr. Shotell agreed to give us a maximum of three months liability. That was the underlying understanding and that was all." When asked if he ever "changed that agreement to be personally liable forever and ever," Pavoncelli replied, "No. If that were ever on the table, I would have never gone to Fountain Valley."

Pavoncelli also testified about RD Sport's corporate standing.[2] He stated RD Sport followed all corporate formalities and recalled declarations in which he stated RD Sport held corporate meetings. But he did not remember his exact position with RD Sport, the identities of its officers, or which officers attended which meetings. He conceded he had no corporate records for RD Sport, some of which had been destroyed in a flood.

Plaintiffs' expert testified about the personal guarantee. He opined defendant acted negligently by not advising plaintiffs the lease modification would exonerate Pavoncelli's personal guarantee and failing to ensure the lease documents contained a three-year personal guarantee from him.

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[2] After taking judicial notice of the orders denying plaintiffs' motions to amend the *RD Sport* judgment, the court interrupted plaintiffs' redirect examination of Pavoncelli on RD Sport's corporate formalities. It stated, "This issue isn't being retried. As we say in the business, res judicata. I am not sure where we are going with his personal liability. He has established that that didn't exist." The court allowed plaintiffs' counsel to proceed, however, counsel had no more questions for Pavoncelli.

Plaintiffs' expert also testified about the alter ego and fraud theories. He opined defendant acted negligently by not seeking to make Pavoncelli liable for the *RD Sport's* judgment under the alter ego theory. He further opined "the passage of time . . . affected the ability to prove up the alter ego case. It should have been done much earlier." He explained, "the continuous length of time that the case ran and nothing was done, would create potential evidentiary problems in establishing an alter ego theory, for example, against the individuals. [¶] In other words, [the] sooner you proceed to assert that theory, the more likely it is you're going to be able to prove it." He opined defendant fell below the standard of care by omitting the fraud claim from the *RD Sport* complaint.

The jury found defendant liable for professional negligence and breach of fiduciary duty. It found defendant's professional negligence caused over $160,000 in damages to plaintiffs, comprising the uncollected $115,000 *RD Sport* judgment, additional lost rent not included in that judgment, and the cost of moving to amend the judgment. The jury awarded no additional damages due to defendant's breach of fiduciary duty.

DISCUSSION

Defendant challenges the judgment and the denial of his motions for directed verdict, new trial, and judgment notwithstanding the verdict. He does not dispute the evidence of his deficient representation of plaintiffs in the lease negotiations and the *RD Sport* case. Defendant instead contends plaintiffs failed to show his negligence caused their damages, which ultimately arose from his inability to make Pavoncelli personally liable for RD Sport's unpaid rent, either through a three-year personal guarantee or the *RD Sport* judgment.

To show causation, plaintiffs "must show that *but for* the alleged malpractice, it is more likely than not that [they] would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244 (*Viner*).) "In both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent." (*Id*. at p. 1242.) "The purpose of [the "but for" causation] requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims." (*Id*. at p. 1241.) "'It is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway.'" (*Ibid*.)

Thus, plaintiffs must support their transactional malpractice claim with substantial evidence Pavoncelli would have agreed to the three-year personal guarantee of RD Sport's rent that defendant negligently failed to obtain.[3] (See *Viner, supra*, 30 Cal.4th at p. 1244; see also *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 663 [the plaintiff failed to "demonstrate that but for [the attorney's] delay, [the plaintiff's] underlying case would have settled at all, let alone at an earlier date, for the same amount, or with the same structure"].)

Plaintiffs offered no evidence Pavoncelli would have agreed to those terms. The only evidence on point came from Pavoncelli, who testified to the contrary. He explained he never would have rented space in Fountain Valley, 22 miles away from his home, if he had to agree to a three-year guarantee. While "plaintiff[s] may use circumstantial evidence to satisfy [their] burden" and "[a]n express concession by the

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[3] Plaintiffs also would necessarily need to establish that a judgment against Pavoncelli would have been collectible in the amount for which defendant was held liable. Alternatively, assuming such evidence was available, plaintiffs could have proceeded with evidence that they would have rejected the RD Sport's tenancy had they understood there was no three-year personal guarantee and would have leased the property to a tenant, ready willing and able to fulfill the three-year lease without default. This latter theory was not pursued, however, either in the trial court or on appeal.

other part[y] to the negotiation that [he] would have accepted other or additional terms is not necessary" (*Viner*, *supra*, 30 Cal.4th at pp. 1242-1243), plaintiffs still must """introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant[s] was a cause in fact of the result."""" (*Id*. at p. 1243.) They failed to do so here.

And plaintiffs must support their litigation malpractice claim with substantial evidence Pavoncelli would have been personally liable for RD Sport's unpaid rent (or the *RD Sport* judgment, which amounts to the same thing) under the alter ego or fraud theories defendant failed to pursue. (*Viner*, *supra*, 30 Cal.4th at p. 1244.)

But plaintiffs offered insufficient evidence showing Pavoncelli's alleged alter ego liability for RD Sport. They relied upon the lack of corporate records and Pavoncelli's spotty memory. This absence of evidence regarding RD Sport's corporate affairs does not satisfy plaintiffs' burden for piercing the corporate veil. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora*).) Plaintiffs failed to offer any evidence that the destroyed records or accurate recollections would show RD Sports was undercapitalized, failed to follow corporate formalities, or had commingled assets.[4] (*Id*. at pp. 538-539.) Plaintiffs' expert did not express an opinion

[4] "Under the alter ego doctrine . . . when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners." (*Sonora*, *supra*, 83 Cal.App.4th at p. 538.) "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate

on the likelihood that defendant could have established Pavoncelli's alter ego liability had he pursued it at trial or soon after judgment. The expert did not identify any evidence that showed — or would have showed — RD Sport was the alter ego of Pavoncelli. And the court took judicial notice of the orders denying plaintiffs' motions to amend the *RD Sport's* judgment to add Pavoncelli as a judgment debtor under an alter ego theory.[5]

It may be true defendant's negligence made it even harder to prove Pavoncelli's alter ego liability, as plaintiffs expert suggested. To be sure, defendant should not "take advantage of his own wrong." (§ 3517.) Still, plaintiffs have the burden of offering some substantial, affirmative evidence supporting the alter ego theory. (*Viner*, *supra*, 30 Cal.4th at p. 1243.) "'The mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.'" (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 758.) The record here leaves only a "'mere probability'" that defendant *ever* could have established alter ego liability.

The parties largely overlook the omitted fraud claim in their briefs, but that claim suffers from a similar causation problem. Plaintiffs' expert did not express any opinion on the merits of the fraud claim. And plaintiffs offered insufficient evidence showing Pavoncelli's alleged fraud caused their damages, and thus failed to show they would have recovered their damages from Pavoncelli but for defendant's failure to assert the fraud claim. (*Viner*, *supra*, 30 Cal.4th at p. 1244.) Plaintiffs' damages essentially arise from RD Sport's failure to pay the rent, not from Pavoncelli's alleged failure to disclose the encumbrance on RD Sport's assets on his financial statement. (See *Gagne v. Bertran* (1954) 43 Cal.2d 481, 491-492 [property owner's damages caused by soil

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capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers." (*Id*. at pp. 538-539.)

[5] Defendant's request for judicial notice filed on January 29, 2009 is granted.

conditions, not misrepresentations about soil that induced him to buy property]; see also *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 365 [student's damages caused by dismissal from school, not misrepresentations that induced him to enroll].)[6]

DISPOSITION

The judgment is reversed. Defendant shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.

[6] Because we reverse for insufficient evidence of causation, we need not reach defendant's claim the court wrongly refused his special jury instruction stating a collectable judgment is an element of professional negligence. Nor do we reach his claim the court wrongly required him to cross-examine Pavoncelli in defense counsel's absence.